No. 20819

In the

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUSTUS GEETER,
Appellant-Defendant

v.

UNITED STATES OF AMERICA,
Appellee-Plaintiff

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

HONORABLE ALFONSO J. ZIRPOLI, Judge

BRIEF OF APPELLANT

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JURISDICTION

This case is before the court on the appeal of Augustus Geeter (appellant) from the conviction and final judgment of the District Court of the United States for the Northern District of California, Southern Division (Alfonso J. Zirpoli Judge), rendered pursuant to jurisdiction conferred by 18 U.S.C. section 3231. The final judgment of the District Court sentenced appellant for violations of 18 U.S.C. sections 2113(a) and 371, the crimes of bank robbery and conspiracy respectively. Appellant invokes the jurisdiction of this court under 28 U.S.C. sections 1291 and 1294(1).

STATEMENT OF THE CASE

On May 25, 1965, a branch of the Bank of America at Hays and Divisadero Streets in San Francisco (RT 20) was robbed by a man and a woman. Diana Campbell and Edward Lucas were identified as the robbers and were tried and convicted prior to the instant trial. Lucas, also known as "Droopy," and Campbell entered the bank about noon. Each had a note they intended to hand to a bank teller. The teller who read Lucas's note gave him $252 (RT 27, 28). The teller who read Campbell's note said to her, "I know you are kidding," whereupon Campbell lost her nerve and walked out of the bank without any money (RT 87, 88).

Mr. Peters, a teller, followed the robbers into the street (RT 35-36). He was joined later by the operations officer, Mr. Katz, who was driving a car (RT 39). Mr. Katz and Mr. Peters followed the robbers' activities closely, attempted to be as observant as possible (RT 47). Both men followed Campbell and Lucas in Mr. Katz's car and observed Campbell getting into a 1956 Oldsmobile being driven by a third party and Lucas disappear through a vacant lot (RT 39-44) and were able to identify both Lucas and Campbell.

On the night of the bank robbery Miss Campbell changed her hair color at the Manor Plaza Hotel (RT 99, 100) and she, appellant, and a Mr. Morgan went to Oakland, California to stay that night in another hotel. The next day the three drove in the same car to Los Angeles, California (RT 101-102) where appellant sought to renew his contract with a recording studio (RT 253-54).

The primary witness presented by the prosecution was Diana Campbell, a woman who was convicted of the robbery, but at the time of the trial still was awaiting sentence (RT 85), and hoped for leniency from the court (RT 125-26). Campbell worked as a prostitute both in Los Angeles prior to coming to San Francisco and in San Francisco while she lived in the same apartment with the appellant (RT 111, 117). This woman accused appellant of initiating, planning, and directing the robbery (RT 95-96, 142-44). She also accused him of driving the getaway car (RT 91-92), a green 1956

Oldsmobile that was identified as a car lent to appellant a month previous to the robbery by Dennis Gully (RT 53, 54). Further, she testified that about a month after the robbery, when FBI agents came to arrest her at her Los Angeles apartment, appellant was present in her apartment but leaped out of a window and fled the premises before the agents gained entry into the building (RT 104-06).

Appellant testified that on the day of the robbery he was working in Oakland on a construction project with a man named Slim (RT 220-22). Appellant's testimony that Slim picked him up in San Francisco on the morning of the robbery and transported him to the job in Oakland (RT 221) was verified by a disinterested witness, Freddy Morgan. Mr. Morgan testified that he was talking to appellant somewhere between 8:00 and 9:00 o'clock on the morning of the bank robbery, that a man pulled up to the hotel in which appellant lived, and that appellant drove off with the other man in the car saying that he was going to work in Oakland (RT 192-94). Appellant also testified that he was not in Miss Campbell's apartment when the FBI agents arrived to arrest her but rather was getting his hair cut in a barber shop in the neighborhood at that time (RT 225).

Although appellant was accused of driving the getaway car by Miss Campbell (RT 91-92), the prosecution fingerprint expert, Roy E. Kramer, testified that the only set of identifiable prints that belonged to appellant in the getaway car was found on the inside left front vent

window (RT 72). Miss Campbell's fingerprints, in comparison, were found "on the left door glass on the inside, on the back of the rear view mirror, on the steering wheel hub and on the inside of the windshield on the right side" (RT 72). Many other fingerprints were found in the car, but were not identified. Further, Mr. Peters and Mr. Katz, both of whom were taking special pains to be observant and who came within thirty feet of the driver of the getaway car (RT 48), could not identify appellant as the person who drove the car (RT 42-43).

During oral argument to the jury the United States Attorney argued facts not in evidence after a warning by the Court to refrain from doing so (RT 291-92). Further, it appears that some of the facts argued by the prosecutor were false and misleading (RT 274, 290-92). The prosecutor also argued on two occasions in such a manner as to bring to the attention of the jury appellant's choice to remain silent in the face of criminal accusations in violation of Fifth Amendment protections (RT 288-89). The Court did not admonish the jury to disregard any of these improper arguments at the time they were offered and the cautionary instruction regarding statements in argument was too general to be effective (RT 351).

SPECIFICATION OF ERRORS

The prosecutor's misconduct by arguing incorrect facts, by arguing facts not in evidence, by drawing inferences from those incorrect and non-evidentiary facts, and by his repeated reference to appellant's choice to remain silent in the face of criminal accusations constitutes prejudicial error not cured below and calls for reversal.

ARGUMENT

The Prosecutor Committed Prejudicial Error By Misconduct In His Closing Argument.

A. The Prosecutor's References to Facts Not in Evidence and to Contradictory Facts, and His References to Certain Facts in Testimony, When the Only Testimony Was Clearly to the Contrary, Constitute Prejudicial Misconduct Not Cured Below.

In Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court stated that the interest of a United States Attorney in a criminal prosecution is not to win a case but to see that justice is done. "[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The United States Attorney failed to live up to

that obligation in this case. He attempted to introduce testimony of an FBI agent relative to the agent's attempts to locate an individual, Slim, referred to by appellant as a companion in Oakland during the time the robbery occurred in San Francisco. The court firmly repulsed the attempt (RT 273-74) and struck the statements made by the agent from the record. The prosecutor knew full well that no part of this testimony was in evidence and that, therefore, any reference to the testimony would be blatantly improper. Nevertheless, in his summation to the jury, he not only referred to the agent's testimony, only to have the court strike the reference, but he immediately thereafter proceeded to draw detrimental and prejudicial inferences based on that stricken testimony (RT 291-92). The prosecutor dwelled at length on the impossibility of the government verifying appellant's alibi given the sketchy description available of Slim, a fact not in evidence. He intended to infer thereby that appellant was withholding information on Slim because Slim was a fiction of appellant's imagination. Most strikingly, the improper argument and inferences were foisted upon the jury after the court gave explicit instructions to the prosecutor that he was not to refer to this testimony: "I am striking it. There is nothing in this record that shows that on the part of anyone to locate Slim, and for present purposes it's not proper." (RT 291.)

Further, the facts upon which the prosecutor was

proceeding, even though not in evidence, appear inconsistent. It seems that either the prosecutor's presentation to the judge in attempting to introduce Padden's testimony or his presentation to the jury in argument was based on a factually incorrect premise. In argument, he strained to convince the jury that only the most tenuous of descriptions of Slim was available (RT 291-92). Yet, when the prosecutor earlier was attempting to induce the court to admit the agent's testimony, he said that the description of Slim provided by appellant was "fairly complete" (RT 274). Whichever factual basis was incorrect, it is unseemly for an officer of the government to reduce the integrity of the fact-finding process in such a way by arguing from a knowingly false premise. Prosecutor's conduct during the trial scarcely constituted that scrupulously fair and honest performance of duty demanded by Berger v. United States, supra.

Nor, it should be noted, was this the only occasion on which the prosecutor misrepresented the facts in evidence. Again attempting unfairly to cast doubt on appellant's alibi, the prosecutor argued that appellant had testified that he was in the Tiki barbershop at the time of Campbell's arrest (RT 290), a barbershop relative to which the prosecutor introduced evidence to prove that it did not exist on that date. The prosecutor was expressly warned by the court during cross examination (RT 257) that appellant's

testimony was not to that effect. Even then the prosecutor carefully questioned appellant further on the issue and was again told that appellant was not in the Tiki barber-shop on the day in question (RT 257-60). Nevertheless, he argued to the jury the direct opposite of appellant's testimony. Fitting a prosecution theory, hence inferences, to facts is permissible. Fabricating facts to fit a prosecution theory is impermissible, is prejudicial, and must be condemned by the judiciary.

In the trial of cases to a jury, the argument of counsel must be confined to the issues of the case, the applicable law, the pertinent evidence and such legitimate inferences as may properly be drawn therefrom. (See London Guaranty & Accident Co., Ltd. v. Woelfle, 83 F.2d 325, 340 (8th Cir. 1936); Chicago & N.W.Ry. v. Kelly, 84 F.2d 569, 573 (8th Cir. 1936). In this case, the prosecutor violated this rule by arguing facts that were not in evidence and were incorrect and by drawing impermissible inferences. His zeal to secure a conviction in this second trial of appellant, after the jury refused to convict in the first trial, can provide no excuse for his misconduct, however understandable it is. The improper suggestions he made in his summation unfairly tainted appellant's testimony concerning his alibi and therefore improperly influenced the jury. The court in Berger v. United States, supra, stated that the average jury has confidence that the obligations

that rest upon the prosecuting attorney will be faithfully observed. "Consequently, improper suggestions, insinuations . . . are apt to carry much weight against the accused when they should carry none." (295 U.S. at 88.) The prosecutor denied appellant the fair consideration of his case due him by law. Appellant may have been acquitted if these improper and prejudicial remarks were omitted, for the jury was required to disbelieve appellant's testimony, of which Slim's presence was an integral part, before it could convict.

The prosecutor's improper argument cannot be said to have been cured by actions of the court. As stated in Hockaday v. Red Line, Inc., 174 F.2d 154, 156 (D.C. Cir. 1949): "It is the duty of the court and of its officers . . . to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, . . . and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error. . . ." Here it is questionable whether even an immediate admonishment by the court to the jury, followed by a specific instruction, could have cured the error (see United States v. Schwartz, 325 F.2d 355, 358 (3d Cir. 1963)). However, only a general instruction was given to the effect that "statements and arguments of counsel . . . are not evidence in the case . . ." (RT 351). Such an instruction was insufficient to neutralize

the prosecutor's misconduct. (See Robinson v. United States, 32 F.2d 505, 508, 510 (8th Cir. 1928).) As no proper warning was given the jurors, they were allowed to consider the case inclusive of the prosecutor's improper statements without benefit of the only action that might have minimized the prejudicial effects of the prosecutor's misconduct.

B. The Prosecutor Violated the Fifth Amendment Protections Afforded Persons Accused of Crimes by Drawing the Attention of the Jury to Appellant's Silence.

In his closing argument the United States Attorney twice referred to the appellant's silence, his failure to disclose information related to the offenses charged (RT 288-89). His tactics unconstitutionally called attention to the appellant's decision to remain silent.

The prosecutor first described the process by which the case came to trial and in particular the process of obtaining a grand jury indictment. He said that the government presented its evidence to the grand jurors, but that "they don't hear the other side because the defendant doesn't have to do anything. He doesn't come to the Grand Jury, he doesn't want to come to the Grand Jury." (RT 288.)

Moments later the prosecutor discussed the incompleteness of the statements obtained by the six FBI agents from appellant in the course of their interrogation of him. After quoting the statements made by appellant to the agents, he went on to say, "[M]r. Geeter was never again interviewed

by the F.B.I. He couldn't. He was a criminal defendant; the lawyer doesn't permit him to be interviewed. He can't be interviewed, so we didn't know anything more about this case than what he told us as far as he was concerned. He was entitled to see what our evidence would look like, as he did once before." (RT 289.)

The prosecutor's comments, particularly juxtaposed to one another as they were, could not help but lead the jury to the inference that disclosure of further information by appellant, either before the grand jury or in the interrogation process, would have been harmful to his cause, and hence that his silence was evidence of guilt. Although Griffin v. California, 380 U.S. 609, 85 Sup. Ct. 1229 (1965), does not directly apply to comments on non-trial silence (this case would be governed by general fifth amendment principles (Schmerber v. California, 384 U.S. 757, 765-66 n.9 (1966)), the prosecutor's comments, in the words of Griffin, cut "down on the privilege by making its assertion costly." (380 U.S. at 614.) As pointed out in Johnson v. United States, 318 U.S. 189, 196-97 (1943), "The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it."

The prosecutor's comments could have had no different effect on the jury than those made by counsel for the government in Carlin v. United States, 351 F.2d 618 (5th Cir. 1965). There the prosecutor said, "[A]ppellant here,

'has yet to say where he was - where he had gone, insofar as the record is concerned - it is silent.'" The Fifth Circuit held such comment to be clearly prejudicial and reversed the judgment below.

A situation analogous to the prosecutor's reference to appellant's non-appearance before the grand jury appears in the case of Stewart v. United States, 366 U.S. 1 (1961). In the course of the third trial of Willy Stewart for murder the prosecutor asked Stewart, who took the stand, "This is the first time you have gone on the stand, isn't it Willy?" (Id. at 4.) He received an answer that can only be described as unresponsive. The Court found that this question could have led to an inference on the part of the jury that the defendant had not testified at the prior judicial proceedings and hence to the inference that his silence was prompted by guilty knowledge. (Id. at 7-8.) The Supreme Court reversed the conviction on the basis of the single question by the prosecutor quoted above. The prosecutor in this case attempted the same tactic when he argued that the appellant presented no evidence to the judicial body which had heard the case presented before, the grand jury, because he did not want to come to the grand jury. Note further that this case presents not the single erroneous statement of the prosecutor, as in Stewart, which in itself requires reversal, but an error compounded by the reference to appellant's failure to disclose

additional information when interrogated.

Similar tactics were attempted by Texas prosecutors to secure a conviction, later vacated on a writ of habeas corpus by the United States District Court for the Northern District of Texas (Smith v. Decker, 270 F. Supp. 225 (1967)). In that case, the prosecutor took special pains to contrast the government's "full disclosure" with appellant's right, and apparent invocation of that right, to remain silent. The prosecutor did so by referring to the reference to the expected charge to the jury of no presumption of guilt because of a failure to testify. The federal court saw through the prosecution tactic and stated: "The clear and unmistakable import of the District Attorney's argument was 'we have brought you all the evidence at our command; the defendants sat silent when they could have spoken.'" (Id. at 226.)

The court held: "The great State of Texas need not be dependent upon such devices for convictions and there is no place in the administration of justice for them." (Id. at 226.) Even less can use of such tactics be sanctioned in the very federal courts charged with protection of federal rights. An examination of the prosecutor's argument in this case clearly demonstrates a use of the same tactic, and use of such a tactic requires reversal.

The constitutional rights protected by the fifth amendment are given zealous protection by the courts of this

nation. The fifth amendment right to remain silent in the face of a criminal accusation and trial is a right particularly deserving of protection because when violated in the manner presented by this case, the violation is apt to unfairly influence the jury's consideration of evidence in the case and it may affect the very validity of the fact-finding process. Unlike evidence arising from an unlawful search, for instance, drawing attention to appellant's silence may lead the jury to incorrect factual conclusions regarding the issue of guilt, because of its ignorance concerning factors other than guilt that might induce silence. Where the issue of guilt is close, as here, such a violation cannot but be held to be prejudicial error requiring reversal. It cannot be held "harmless beyond a reasonable doubt" (Chapman v. State of California, 386 U.S. 18, 24, 87 Sup. Ct. 824, 828 (1967)).

CONCLUSION

It is respectfully submitted that the misconduct of the prosecutor, including a violation of the constitutional rights afforded individuals accused of crimes, requires reversal of the judgment below.

Dated: May 10, 1968.

/s/ ROLAND E. BRANDEL

Roland E. Brandel
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ ROLAND E. BRANDEL
Attorney